

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	CG Docket No. 02-278
Petition of Prodigy Diabetes)	
Care, LLC for Retroactive Waiver)	CG Docket No. 05-338
of 47 C.F.R. § 64.1200(a)(4)(iv))	

**COMMENTS OF RHEA DRUGSTORE, INC.
ON PETITION FOR RETROACTIVE WAIVER**

On October 30, 2014, the Federal Communications Commission (the “Commission”) issued an order (the “Opt-Out Order”) reaffirming that 47 C.F.R. § 64.1200(a)(4)(iv) requires all fax advertisements—invited or not—to contain an adequate opt-out notice. Prodigy Diabetes Care, LLC (“Prodigy”) did not adhere to the Order and continued to transmit fax advertisements without an opt-out notice. Now that Rhea Drugstore, Inc. (“Rhea Drug”) seeks to hold it accountable, Prodigy wants a retroactive waiver. This request is nothing more than an attempt to escape from liability in a private lawsuit. As the Opt-Out Order emphasizes, potential legal liability is not a valid ground for a waiver. Nothing in Prodigy’s petition indicates that it was actually confused about the Commission’s opt-out requirement or is, in fact, similarly situated to previous waiver recipients. To the contrary, it is unlike other recipients, as it violated not only the Commission’s regulations but also the Opt-Out Order itself and other provisions of the Telephone Consumer Protection Act (“TCPA”). It is in the public interest to hold Prodigy accountable for these violations. Accordingly, Prodigy’s Petition for Retroactive Waiver should be denied.

BACKGROUND

In December 2014, Rhea Drug received a fax from Prodigy advertising certain medical supplies. An exact copy of the fax Rhea Drug received is attached to these comments as Exhibit A. The fax contains no opt-out language. Nor does it contain any information indicating the date and time the faxes were sent or the number of the sender.

On January 23, 2015, Rhea Drug filed a class-action lawsuit in the Eastern District of Arkansas alleging that Prodigy violated the TCPA and the Commission's regulations. *See Rhea Drugstore, Inc. v. Prodigy Diabetes Care, LLC*, No. 15-54 (E.D. Ark.). The complaint alleges that Prodigy sent Rhea Drug an unsolicited fax advertisement without an adequate opt-out notice. Because 47 C.F.R. § 64.1200(a)(4)(iv) requires an opt-out notice on all faxes, Rhea Drug also seeks to represent a class of persons to whom Prodigy sent noncompliant fax advertisements, regardless of whether the faxes were invited. As of this writing, Prodigy has answered the complaint and has moved to stay the action until the Commission rules on its petition. It is unclear when the court might rule on the motion to stay.

In its Opt-Out Order, the Commission granted specific petitioners retroactive waivers from the requirements of 47 C.F.R. § 64.1200(a)(4)(iv) and invited "similarly situated parties" to also seek waivers. *See* Opt-Out Order ¶30. On March 12, 2015, Prodigy filed a petition claiming it is a "similarly situated party" and requesting retroactive relief from its obligation to provide opt-out notices on invited

faxes. On March 27, 2015, the Commission requested comments on Prodigy's petition by April 10, 2015, which Rhea Drug now provides.

ARGUMENT

A. Prodigy is not similarly situated to previous waiver recipients.

In the Opt-Out Order, the Commission invited “similarly situated parties” to seek individual waivers such as those granted in the Order. At the same time, the Commission emphasized the obligation of all senders to include adequate opt-out notices on invited faxes: “Having confirmed the Commission’s requirement to provide opt-out notices on fax ads sent with the recipient’s prior express permission, however, we expect all fax senders to be aware of and in compliance with this requirement.” Opt-Out Order ¶30. Prodigy’s transmission of noncompliant faxes *after* the Opt-Out Order undermines its claim to be similarly situated to previous waiver recipients. Prodigy is different from other senders in an additional way: its faxes fail to provide a date, time, or number for the sender, in violation of 47 U.S.C. § 227(d). Prodigy should not be rewarded with a waiver when it violates a clear Commission mandate as well as statutes that the Commission administers.

Prodigy in no way explains how it is, in fact, similarly situated to companies that received a waiver in the Opt-Out Order. In the Order, the Commission found “two grounds that . . . led to confusion among affected parties (or misplaced confidence that the opt-out notice rule did not apply to fax ads sent with the prior express permission of the recipient).” *Id.* ¶24. One was a contradictory footnote in the original order adopting 47 C.F.R. § 64.1200(a)(4)(iv). *See id.* The other was

potentially deficient notice of the Commission’s intent to adopt 47 C.F.R. § 64.1200(a)(4)(iv). *See id.* ¶25. At no point in its petition does Prodigy claim the footnote actually caused it to become confused. Instead, it offers a perfunctory reference to the footnote. Pet. at 3–4. Moreover, Prodigy cannot possibly have been prejudiced by deficient notice of a rulemaking when the resulting rule had been on the books for more than eight years prior to its transmission of noncompliant faxes. Prodigy’s easy invocation of the rationales in the Opt-Out Order does not make it similarly situated to other waiver recipients.

Though its claim to be “similarly situated” is largely conclusory, Prodigy does invoke one (and only one) concrete ground for finding it is like other waiver recipients: it is a defendant in a class-action lawsuit. However, that ground cannot support a waiver. As the Opt-Out Order emphasized, “the risk of substantial liability in private rights of action” is not, by itself, “an inherently adequate ground for waiver.” Opt-Out Order ¶28.

B. There is no good cause for a waiver.

Regardless of whether Prodigy is similarly situated to other waiver recipients, its case for a waiver must be judged on an individual basis. *See id.* ¶30 n.102. The relevant inquiry is whether there is good cause for a waiver, which requires (1) that there be special circumstances warranting deviation from the rule and (2) that waiver would better serve the public interest than adherence to the rule. *See id.* ¶23.

Neither criterion is present here. The most Prodigy can muster for a special circumstance is that the record is silent as to whether Prodigy knew it had to include opt-out notices on invited faxes. *See* Pet. at 4. This appears to be an argument for forgiveness based on ignorance of the law.¹ Even assuming Prodigy was actually ignorant of the law, however, that is not a special circumstance that justifies a waiver. As the Commission explained in the Opt-Out Order, “simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver.” Opt-Out Order ¶26. Accepting Prodigy’s argument would mean that any company could violate the Commission’s regulations—even by continuing to send noncompliant faxes after the Opt-Out Order—yet obtain a waiver because no evidence shows the company was conscious of its obligation to include opt-out notices.

Furthermore, Prodigy’s continued violations of the opt-out rule undermine any claim that a waiver is in the public interest. Prodigy should have known that *all* fax advertisements require opt-out language. The wording of 47 C.F.R. § 64.1200(a)(4)(iv) is perfectly clear, so it should have known this all along, to say nothing of what it should have known after October 30, 2014. Yet even after the Opt-Out Order left no question about the Commission’s opt-out requirements, Prodigy continued to send noncompliant faxes. The Commission should not simply accept Prodigy’s word that it “has taken measures to ensure future compliance with

¹ Notably, Prodigy does not affirmatively state that it was unaware of its opt-out obligations. It is possible that Prodigy consciously disregarded the Commission’s regulation because it thought it profitable to exclude opt-out notices from its faxes. That issue will be tested in the litigation. However, even the best-case scenario—ignorance of the law—does not justify a waiver.

Section 64.1200(a)(4)(iv) and all other provisions of the TCPA,” Pet. at 5—especially in light of its blatant post-Order violations. The public interest is better served by holding Prodigy accountable than by absolving it of responsibility.

CONCLUSION

All told, Prodigy’s petition comes down to the assertion that it is entitled to a waiver because other parties got one. However, Prodigy is similarly situated to past waiver recipients in one respect only: it is a defendant in a lawsuit for sending fax advertisements without opt-out notices. That is not the sort of similarity the Commission had in mind when it invited other fax senders to apply for waivers. Prodigy appears to have been in no way confused about its obligation to include opt-out notices on its faxes. At best, it was ignorant of the law, which is an insufficient ground for a waiver. Because Prodigy continued to send noncompliant faxes after the Opt-Out Order and otherwise violated the TCPA, the public interest favors accountability. There is no good cause for an individual waiver here. Accordingly, Rhea Drug respectfully requests that the Commission deny Prodigy’s Petition for Retroactive Waiver.

Dated: April 9, 2015

RHEA DRUGSTORE, INC.

By: /s/ John C. Williams

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EXHIBIT A



PRODIGY®

www.prodigymeter.com

To:

From: Medical Devices Operations, LLC

Subject: Prodigy Low Cost Diabetic Test Strips and Free Meters

Message: Save on diabetic supplies and get Free State of the Art Prodigy Autocode Talking Meters with the Prodigy Combo Pack. Place an order with your wholesaler or buy direct from the manufacturer. Feel free to contact your Prodigy rep at 704-285-6460 to learn more.

Prodigy Diabetes Care

9300 Harris Corners Parkway Suite 450 Charlotte, NC 28269

Tel: 704-285-6400

Email: info@prodigymeter.com Website: <http://www.prodigymeter.com>

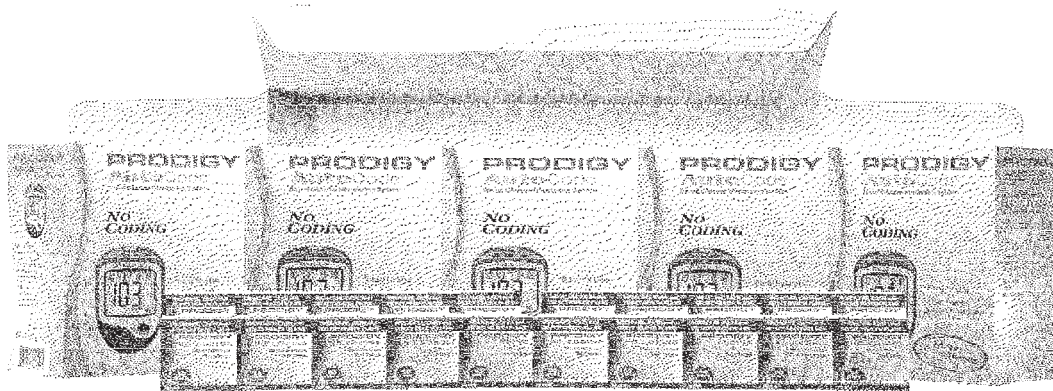
December 9, 2014

Dear Valued Customer,

We are pleased to announce that we have extended the promotional term for our Prodigy Combo Pre-Packs #75100. The combo will now be made available through the end of the 2015 calendar year.

Each Prodigy Combo Pre-Pack #75100 contains:

- 5 x No-Charge AutoCode Talking Meter Kits #70120 (Not For Retail Sale)
- 20 x (50-ct) No Coding Test Strips #73200 (Medicare, Cash and Select Health Plans[Humana*])



Ordering Information:

DESCRIPTION	ITEM, NDC & UPC #s	WAC
Prodigy Combo Pre-Pack Contents: 5 x No-Charge AutoCode Talking Meter Kits #70120 (Not For Retail Sale) 20 x (50-ct) No Coding Test Strips #73200 (Medicare, Cash and Select Health Plans[Humana*]) Carton Specifications: L: 10 7/8", W: 9 7/8", H: 9 3/8" Carton Weight: 4.60 LBS	75100 08484-0751-00 384840751002	\$110.00** Includes 5 No-Charge Meters

Prodigy's Combo Pre-Pack offers significant savings and is an excellent choice for Medicare, Cash and Humana* diabetes patients. Thank you for your support and for stocking up today.

Sincerely,

Rick Roberts,
Senior Director, Retail Markets

* Verify eligibility prior to billing.
** Wholesale cost of goods applies.

Prodigy Diabetes Care (Top Items) Product Details with Order Entry #'s: **AmerisourceBergen Order #s, Cardinal Health CIN #s & McKesson Economost #s**

Product Description	NDC#	UPC#	ORDER #	WAC*
Prodigy AutoCode Talking Meter Kit #70120 (Speaks in 4 languages: English, Spanish, French & Arabic)	08484-0701-20	384840701205	ABC 10010958 CIN 4264040 McK 2173466	\$7.95
Prodigy Pocket Meter Kit #70802-B	08484-0708-02	384840708020	ABC 10007521 CIN 4264057 McK 1630029	\$7.95
Prodigy Voice Meter Kit #71950	08484-0719-50	384840719507	ABC 10007276 CIN 4264024 McK 2172054	\$55.00
Prodigy No-Coding Test Strips 50ct #73200 (Medicare-Cash-Humana) Net SKU - (Pink Box)	08484-0732-00	384840732001	ABC 10117286 CIN 4875845 McK 1970987	\$5.50
Prodigy No-Coding Test Strips 50ct #72500 (Commercial Insurance Plans) Rebated SKU - (Blue / Green Box)	08484-0725-00	384840725003	ABC 10009672 CIN 4335733 McK 2171502	\$17.95
Prodigy Combo Pre-Pack #75100 Contents: 20 X 50ct Prodigy No-Coding Test Strips #73200 (Medicare-Cash-Humana) Net SKU (Pink Box) 5 x NO-CHARGE Prodigy AutoCode Talking Meter Kits #70120	08484-0751-00	384840751002	ABC 10129584 CIN 4880645 McK 2054799	\$110.00
Prodigy Control Solution (Low) 4ml #990310	08484-9903-10	384849903105	ABC 10007282 CIN 4262721 McK 1439884	\$2.00
Prodigy Twist Top Lancets 28G (100ct) #081028	08484-0810-28	384840810280	ABC 10108720 CIN 4891727 McK 1911999	\$1.85
Prodigy Lancing Device Adjustable Depth W/Clear Cap #990355	08484-9903-55	38484990355	ABC 10007278 CIN 4262812 McK 1439924	\$3.00

***WAC = Wholesaler Acquisition Cost Prior to Mark-Up +/-**